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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

Appellant,

vs.

MRS. ELIZABETH WEST BOHN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

WEBB M. MIZE,
Counsel for Appellee.

J. D. ARRINGTON,
R. W. THOMPSON, JR.,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Exhibit "A"—Certificate of Clerk of Circuit Court of Harrison County, Mississippi, re mandate	8
Motion to dismiss or affirm	11

Statutes Cited.

Constitution of the United States, 14th Amendment	4, 5
Mississippi Code of 1930:	
Section 1404	1
Section 1410	2, 4
Section 1412	3, 4
Section 1765	3
Rules of the Supreme Court of the United States, Rule 12:	
Par. 1	12
Par. 2	12
Par. 3	12

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EDGAR BOHN,

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vs.

MRS. ELIZABETH WEST BOHN,

Appellee.

STATEMENT OF APPELLEE OPPOSING JURISDICTION.

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1. This suit is in ejectment, and for the collection of rents. A declaration (R. 45-48) was filed in the Circuit Court of Harrison County, Mississippi, by Mrs. Elizabeth West Bohn, the widow of H. N. Bohn, deceased. The appellee at the time of the filing of her declaration was more than sixty years of age. Appellee's right to the exclusive use of the property rested on Sections 1404, 1410, 1412, and 1765 of the Mississippi Code of 1930. These sections are as follows:

> "1404. Descent of property as between husband and wife.—If a husband die intestate, and do not leave children or descendants of children, his widow shall be en-

titled to his entire estate, real and personal, in fee-simple, after payment of his debts; but where the deceased husband shall leave a child or children, by that or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate, in either case in fee simple. If a married woman die, owning any real or personal estate not disposed of, it shall descend to her husband, and her children or their descendants if she have any surviving her, either by a former husband or by the surviving husband, in equal parts, according to the rules of descent. And if she have children, and there also be descendants of other children who have died before the mother, the descendants shall inherit the share to which the parent would have been entitled if living, as coheirs with the surviving children. But if she have no children or descendants of them, then the husband shall inherit all of her property."

(Mississippi Code of 1930—pages 728-729.)

"1410. Descent of exempt property.—The property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them, and the children and grandchildren of the descedent, as tenants in common, grandchildren inheriting their deceased parent's share, and if there be no children or grandchildren of the decedent, to the surviving wife or husband, and if there be no such survivor to the children and grandchildren of the deceased owner; but where the surviving husband or wife shall own a place of residence equal in value to the homestead of the decedent, and the deceased husband or wife have not surviving children or grandchildren of the last marriage, but have children or grandchildren of a former marriage, the homestead of such decedent shall not descend to the surviving husband or wife, but shall descend to the surviving children and grandchildren of the decedent by such former marriage as other property."

(Mississippi Code of 1930—page 731.)

"1412. Exempt property not to be partitioned in certain cases.—Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood, as long as it is occupied or used by the widow, unless she consent.

(Mississippi Code of 1930—page 732.)

"1765. Homestead exemption—certain persons over sixty years not required to occupy or have family.—Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him or her, but the quantity of land shall not exceed one hundred and sixty acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of three thousand dollars. But husband or wife, widower or widow, over sixty years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not having family or not occupying the homestead."

(Mississippi Code of 1930—page 866.)

2. The property involved was the homestead of the appellee and her late husband. The appellant is the adult son of H. N. Bohn, deceased, by a former marriage. The appellee's position in the lower court was that she had a life estate in the property and was entitled to the exclusive use and occupancy of the homestead during her widowhood.

3. To the declaration in the State Circuit Court, the appellant filed a demurrer which brought up no Federal ground but was based on the theory that both parties to the suit were tenants in common, and therefore ejectment would not lie (R. 51-52). The demurrer was overruled, and a plea of the general issue was filed (R. 54), and notice was given under the general issue to the effect that H. N. Bohn,

during his lifetime, did not designate or file for record a homestead declaration. A special plea was filed alleging an agreement for the appellant's occupancy of the property. A second special plea was filed pleading limitation of action. A third special plea was filed likewise pleading limitation of action. Replications were filed to the pleas and issue was joined, and the case proceeded to the taking of testimony, at the conclusion of which the Circuit Court instructed the jury to find for the plaintiff and gave numerous instructions and refused certain instructions requested by the appellant. None of these instructions and none of the pleadings raised any Federal question whatever. The jury returned a verdict for the sum of Two Thousand Two Hundred and Fifty ($2,250.00) Dollars in favor of the appellee, and judgment was rendered by the said Circuit Court in favor of the appellee in the sum of Two Thousand Two Hundred and Fifty ($2,250.00) Dollars for rents, and for possession of the premises.

4. In said Circuit Court the appellant filed a motion for a new trial, which motion was overruled. Thereupon, the case was appealed to the Supreme Court of the State of Mississippi. The assignment of errors in the Mississippi Supreme Court raised no federal question and no constitutional question. In fact, the validity and constitutionality of the statutes involved were not questioned.

5. The judgment of the Circuit Court was affirmed by written opinion of the Supreme Court of the State of Mississippi. A suggestion of error was filed, which suggestion of error asserted that "the application given by the court to Sections 1410 and 1412 of the Mississippi Code of 1930 deprives appellant of a valuable right guaranteed by the 14th Amendment to the United States' Constitution". The question of the validity or constitutionality of the

statutes involved has never yet been raised in this cause, and, in the assignment of errors to this Court, the validity or the constitutionality of the statutes involved is not raised; and there is no federal question whatever in this cause.

6. The assignment of errors filed in this Court, taken in its most favorable light for the benefit of appellant, merely states that the Supreme Court of the State of Mississippi misapplied the statutory law of the State of Mississippi, and in so misapplying it, violated the 14th Amendment to the Constitution of the United States. It should be noted also that the assignment of errors does not state in what manner the appellant was deprived of any property rights guaranteed by the 14th Amendment.

7. The Record shows that an appeal was allowed by the Supreme Court of the State of Mississippi to this Court on March 18th, 1942. But it also shows that on March 14th, 1942, or four days previously, the Clerk of the Mississippi Supreme Court issued its Mandate to the Circuit Court of Harrison County, Mississippi, and that the costs of the appeal were paid, and that the Mandate was filed in the Circuit Court of Harrison County, Mississippi, on March 16th, 1942, two days before the appeal was allowed, and the Supreme Court of Mississippi thereby lost all jurisdiction after its Mandate had been executed and sent to the lower court and before the appeal to this Court. A certificate of the Clerk of the Circuit Court of Harrison County, Mississippi, is annexed hereto and marked Exhibit "A" hereto.

8. The bond in this cause is insufficient. No notice was given to the appellee of the application for this appeal, and no opportunity given to appellee to object to the sufficiency of the bond. The bond is not sufficient to cover the judgment. The judgment was in the sum of Two Thousand

Two Hundred and Fifty ($2,250.00) Dollars; five per cent (5%) damages for taking an appeal allowed by the Mississippi Law amounts to One Hundred Twelve Dollars and Fifty Cents ($112.50); interest on the judgment at the rate of six per cent (6%) makes the judgment for a still larger amount. In addition to this, the judgment of the court is likewise for possession of the homestead property, and the taking of this appeal has deprived the appellee of the use of her property (a valuable right), and the appeal has prevented her from taking possession of it.

9. This appeal was sued out merely for delay, and under Rule 30 of this Court, ten per cent (10%) additional damages should be allowed appellee. Likewise, costs have to be paid, and the bond is insufficient.

10. Furthermore, Rule 12 of the Rules of the Supreme Court of the United States has not been complied with. Appellant's statement does not refer to any statutory provision believed to sustain jurisdiction. It does not refer to any statute of the State, statute or treaty of the United States, the validity of which is involved. It does not include a statement of grounds upon which it is contended that the questions involved are substantial. It does not specify the stage in the proceedings in the court of first instance or in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised. (They are attempted to be raised here for the first time.) Appellant does not refer to the method of raising any federal question, nor does he show the manner in which they were raised by the court, nor does appellant refer to any specific portions of the Record where any such matter appears. Appellant did not direct appellee's attention to the provisions of paragraph (2) of Rule 12.

Appellee therefore respectfully submits that this Court has no jurisdiction of this appeal and that the appeal should be dismissed or the judgment below affirmed; and appellee files herewith a Motion to Dismiss or Affirm.

Respectfully submitted,

WEBB M. MIZE,
Attorney for Appellee.

Of Counsel:
J. DRAKE ARRINGTON,
R. W. THOMPSON, JR.

EXHIBIT "A".

STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, hereby certify that in the case of Elizabeth West Bohn versus Edgar Bohn, No. 10,691, which was appealed to the Supreme Court of the State of Mississippi from the Circuit Court of Harrison County, Mississippi, and finally determined in said Supreme Court of Mississippi, was certified back to me by the Clerk of the Supreme Court of the State of Mississippi, by Mandate, including copy of judgment rendered by said Supreme Court, together with copy of opinion of said Court in said cause, and I further certify that said Mandate was issued on the 14th day of March, 1942, and was filed in my office on the 16th day of March, 1942, and I further certify that the terms of the Mandate have been partially executed as of this date, as costs of appeal to the Supreme Court of Mississippi have been fully paid.

Given under my hand and official seal of said Court hereto affixed, on this 30th day of March, 1942.

[SEAL.] A. J. RAMSAY,
Clerk Circuit Court, Harrison County, Mississippi.

Certificate to Signature of Clerk.—See Sec. 905, Revised Statutes U. S.

THE STATE OF MISSISSIPPI:

I, L. C. Corban, sole presiding Judge of the Second Judicial Circuit Court District, of the State of Mississippi (said District including the County of Harrison) do hereby certify that A. J. Ramsay, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the Clerk of the Circuit Court of Harrison County, in said State, duly elected and qualified, and that his said attestation is in due form.

Witness my signature, this the 30th day of March, A. D. 1942.

[SEAL.]

L. C. CORBAN,
Judge.

Certificate of Clerk to Signature. See Sec. 906, Revised Statutes U. S.

THE STATE OF MISSISSIPPI,
Harrison County:

I, the undersigned Clerk of the Circuit Court of the County of Harrison, in said State (said Court being a court of record, and having an official seal), do hereby certify that L. C. Corban, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the sole presiding Judge of the Second Judicial Circuit Court District of said State, which said District includes the said County of Harrison, and that said L. C. Corban, as aforesaid, is now, and was at the date of said attestation, duly commissioned and qualified.

Given under my hand and seal of office, at Gulfport, Mississippi, this the 30th day of March, A. D. 1942.

[SEAL.]

A. J. RAMSAY,
Clerk.

SUPREME COURT OF THE UNITED STATES

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MRS. ELIZABETH WEST BOHN,

Appellee.

MOTION TO DISMISS APPEAL OR AFFIRM.

And now comes the appellee and moves the Court to dismiss or affirm the appeal for the following reasons, to-wit:

1. The Statement of the Case and Assignment of Errors filed in this Court fail to show any jurisdiction in this Court to review the judgment or decree of the Mississippi Supreme Court.

   a. There is no federal question involved.

   b. The Statement does not refer to any statutory provisions believed or alleged to have sustained jurisdiction.

2. The Statement of the Case and proceedings filed in connection therewith are in violation of the Rules of the United States Supreme Court.

   a. The Statement fails to refer to the statutory provision believed to sustain the jurisdiction.

b. The Statement fails to refer to the statute of the State, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions.

c. The Statement does not include a statement of the grounds upon which it is contended the questions involved are substantial.

d. The Statement fails to specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised.

e. The Statement fails to show the method of raising them or the manner in which they were passed upon by the court.

f. The Statement fails to make any pertinent quotation or specify portions of the Record, or a summary thereof, with specific reference to the places in the Record where the matter appears, as will support the assertions that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court, and cited no cases in support thereof.

g. The Statement fails to attach the judgment or decree of the Mississippi Supreme Court sought to be reviewed.

h. The appellant has failed to serve appellee with a statement as required by paragraph (2) of Rule 12 directing attention to paragraph (3) of Rule 12.

All of which are in violation of Rule 12, paragraphs (1), (2) and (3).

3. The proceedings filed herein show conclusively upon their face that the judgment or decree of the Mississippi

Supreme Court was based upon a non-Federal ground adequate to support it.

a. The Statement shows conclusively that no federal question was raised or involved in the Circuit Court of Harrison County, Mississippi and none in the Supreme Court of the State of Mississippi.

b. The Assignment of Errors from the Circuit Court of Harrison County, Mississippi to the Supreme Court of the State of Mississippi assigned no error of a federal nature.

c. The Supreme Court of Mississippi merely construed a statute of the State, the validity or constitutionality of which statute is not challenged.

d. The construction of a State's statute by its Supreme Court in determining the meaning and application of such statute is binding upon the United States Supreme Court.

e. The appellant, if he had a right to review (which we deny), has a right only by certiorari.

4. The Mississippi Supreme Court was without authority to grant an appeal for the reason that its Mandate had been returned to the court of original jurisdiction (the Circuit Court of Harrison County, Mississippi) prior to the date an appeal was allowed and (as shown by the certificate of the Clerk of the Circuit Court of Harrison County, Mississippi, certified to under the Acts of Congress, and annexed to appellee's Statement in opposition) had been partially executed when the appeal was taken.

a. The Clerk's certificate attached to appellee's Statement must be given full faith and credit.

b. The United States Supreme Court will not undertake to review a decision of the State Court when the Mandate has been returned to the lower court and partially or completely carried into effect.

5. The supersedeas bond given and approved for this appeal is not sufficient in amount and as to its provisions to adequately protect appellee and is in violation of the Rules of this Court, and particularly Rule 36, paragraph (2).

a. There is no provision in said bond permitting compensation or indemnity to appellee for delay.

b. The amount is not sufficient to discharge the judgment of the Mississippi Supreme Court and the costs incident to this appeal and such damages as may be awarded by this Court.

6. The proceedings herein show that this appeal is prosecuted by the appellant solely for the purpose of delay.

Therefore, for the above reasons, we respectfully submit that this appeal should be dismissed or the judgment of the Mississippi Supreme Court affirmed.

Respectfully submitted,

WEBB M. MIZE,
Attorney for Appellee.

Of Counsel:

R. W. THOMPSON, JR.,
J. DRAKE ARRINGTON.